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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 321

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., AND CHARLES H. BROMANN,
Petitioners,

vs.

JEWEL TEA COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Associated Food Retailers of Greater Chicago, Inc., and Charles H. Bromann pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 27, 1963. This petition is a companion to the petition filed in *Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al.* v. *Jewel Tea Company, Inc.*, No. 240, October Term, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 331 F. 2d 547; it is reprinted at pp. 3a-11a of the petition in No. 240, October Term, 1964. The opinion of the District Court is reported at 215 F. Supp. 839 (R. 661-678). The

prior opinion of the Court of Appeals on the interlocutory appeal, affirming denial of the motion to dismiss the complaint and to which the present petitioners were not parties, is reported at 274 F. 2d 217, cert. denied, 361 U. S. 936, and is reprinted at pp. 12a-22a of the petition in No. 240, October Term, 1964. The prior opinion of the District Court, holding that the complaint was sufficient to withstand a motion to dismiss, is reported at 36 CCH Lab. Cas. ¶65,344 (R. 58-65).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1964, and is reprinted at p. 1a of the petition in No. 240, October Term, 1964. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

In addition to the questions presented in the petition in No. 240, October Term, 1964, which are incorporated by reference in this petition, the following further questions are presented:

1. Upon the assumption that a collective bargaining agreement contains a provision offensive to the antitrust laws, whether an employer association and its spokesman representing member employers in collective bargaining can be held to have conspired to secure and retain that provision where (1) there is no evidence connecting them with proposing or supporting that provision, (2) they engaged in no conduct other than participation in multi-employer negotiations in a manner identical with all other employers also participating in the same negotiations, and (3) the provision embodies a union aim achieved by the unions solely through the exertion of their own bargaining power.

2. Whether there was presented any evidence of conspiracy whatsoever at the trial of the case.

3. Whether a single document (collective bargaining agreement), containing a partial invalidity clause rendering null and void all provisions contrary to law, can be the basis of antitrust action where there is no evidence of conduct to effect restraint of trade.

STATUTES INVOLVED.

The pertinent provisions of the Sherman Antitrust Act (26 Stat. 209, 15 U. S. C. § 1), the Clayton Act (38 Stat. 730, 15 U. S. C. § 12), the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. § 101), and the National Labor Relations Act (61 Stat. 136, 29 U. S. C. § 151) are set forth at pp. 23a-30a of the petition in No. 240, October Term, 1964.

STATEMENT.

Associated Food Retailers is a trade association composed of food store operators in the Chicago area, and its secretary and treasuer Charles H. Bromann conducts collective bargaining on behalf of Associated (R. 657-658). Associated is but one of many employers, including Respondent and all the major chains, which engage in joint negotiations with seven local labor unions representing the meat cutters employed in the meat departments of the food stores (R. 121-123, 139-140). The uniform bargaining agreements which emerge from these joint negotiations include the following regulation of market operating hours in the retail sale of fresh meat to which all employers and all unions in the Chicago area are parties (pl. exs. 8, 9, § 5.1):

> Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

The complaint would bring this provision of the agreement within antitrust proscription as the product of a conspiracy among Associated, its members, and its secretary and treasurer to eliminate competition in the sale of fresh meat after 6:00 p.m., an alleged conspiracy said to be aided and abetted by the unions as its enforcing arm (R. 14-27). As described by the District Court, "the gist of the complaint is that there is and has been a conspiracy among and between Bromann, Associated, and the defendant Unions" (R. 683). At trial, at the close of plaintiff's case, Associated and Bromann moved to dismiss the complaint against them (R. 682). The motion was granted, the District Court stating that "there is wanting any evidence tying in Associated and Bromann as conspirators" (R. 683-684). All that appears is that "Bromann conducts collective bargaining for and on behalf of Associated, which enjoys the industry wide contract" (R. 684). "Yet, realistically speaking, there is absent any evidence showing Bromann or Associated, or both, conspired with the defendant Unions in forcing the restrictive clause upon Jewel" (R. 684).

The complaint having been dismissed against them at the close of plaintiff's evidence. Associated and Bromann of course took no further part in the trial. The trial continued against the unions, the District Court stating that, "Since Jewel has sought relief from the defendant Unions apart from the theory of conspiracy, the court now denies the defendant Unions' motion to dismiss the complaint" (R. 684). The evidence introduced by the unions as part of their case affirmatively disproved the existence of any conspiracy (R. 670); it established that the limitation upon market operating hours was a union goal, designed to protect the butchers' wish not to work at night and to protect their work from performance by others, attained long before either Associated or respondent came on the scene,

and preserved by the exertion of union bargaining power alone (R. 671-672); these "facts and circumstances," concluded the District Court, "are inimical to plaintiff's theory that the unions insisted on the restriction as the tool of the employer group and at their behest" (R. 672). The complaint was therefore dismissed against the unions as well (R. 678).

The Court of Appeals reversed, not only with respect to the unions to which alone the limitation was attributable, but also as to Associated and Bromann. The Court of Appeals gave no reason for implicating Associated and Bromann, other than that they had entered into the agreement, a factor equally and indistinguishably true of respondent itself and of all other employers as well.

REASONS FOR GRANTING THE WRIT.

I. The Question of Preserving Multi-Employer Collective Bargaining.

With respect to the vulnerability of labor union activity to the antitrust laws, this Court has explained that "the same labor union activities may or may not be in violation of the Sherman Act, *dependent upon whether the union acts alone or in combination with business groups.*" *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 810 (emphasis supplied). The decision below would find a businessmen-union combination a conspiracy among and between them, simply in the fact of a collective bargaining agreement reached as a result of common participation of employers and unions in joint negotiations. The decision below therefore strikes a crippling blow at a common form of collective bargaining in which negotiations are conducted on a joint basis between a group of employers and a group of unions. No employers can safely join together to bar-

gain collectively and reach agreements on a group basis if that alone suffices to implicate them in antitrust liability—including staggering treble-damage payments*—for conduct which is realistically attributable exclusively to the unions. The result is at war with this Court's holding that the National Labor Relations Act expressly recognizes the legitimate interest "in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms" (*N. L. R. B.* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87, 96); "This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to match increased union strength" (*id.* at 94-95); and "Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" (*id.* at 95). Yet the case at bar condemns innocent conduct solely involving participation in group collective bargaining through the legal fiction of calling the employer's participation an antitrust violation. Even the Plaintiff-Respondent's concept of the law of this case indicates unequivocally that there must be more than innocent participation in group bargaining to support action—there must be conspiratorial conduct in some measurably perceptible form.

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* Respondent's complaint originally sought $25,000 trebled (R. 26-27); the complaint was amended at trial to $17,000,000 trebled (R. 78, Tr. 410); at the close of trial respondent reduced its claim to $50,000 trebled; and, in seeking a bond as a condition of the stay of the mandate in the court below, respondent raised its claim to $500,000.

II. The Question of Conspiracy.

Plaintiff-Respondent's complaint alleged conspiracy, and Plaintiff-Respondent then went about to bring in evidence of conspiratorial conduct, but failed dismally, being able only to introduce a written contract with no overt acts to show that Petitioners had played any part at all in carrying out or requiring a ban against meat sales after 6 o'clock.

Thus the following review of the case as to complaint and state of evidence supports dramatically the reasons for granting the Writ of Certiorari in order to free innocent industry-wide collective bargaining conduct from destructive condemnation:

A. *The complaint:* Conspiracy is at the heart of the complaint. Thus, paragraph 16(d) of the complaint alleges that the "co-conspirator members of defendant Associated have agreed among themselves to insist that all collective bargaining agreements" shall contain the market operating hours provision; paragraph 16(e) alleges that "Associated, its members and officers have conspired and agreed with the other defendants [the unions]" to this end; paragraph 16(f) alleges that the "defendant unions, their officers and members have acted as the enforcing agent of the conspiracy." (R. 23.) Paragraph 18 refers to "defendant unions, their officers and members, *conspiring* together with Associated, Bromann, and Associated's employer members" (R. 23); paragraph 19 refers to the insistence upon the market operating hours provision of "defendant Associated and its *co-conspirator members* and Bromann and the defendant unions, their officers and members" (R. 24); paragraph 20 states that "in furtherance of *this conspiracy* . . . Defendant Associated refused to enter into an agreement permitting night openings and the defendant unions supported and abetted it in that refusal." (R. 24) (emphasis supplied.)

B. *The state of the evidence at the close of plaintiff's case:* Conspiracy was thus the issue which the complaint framed and respondent was required to prove. The total absence of any evidence of conspiracy at the close of plaintiff's case rightfully resulted in the grant of Associated's and Bromann's motion to dismiss.

At the close of respondent's case, with no proof yet tendered by the defendants, the sole reference in the whole of the record to Associated was that, at the conclusion of the 1957 negotiations, Associated acquiesced in the "final *Union* demand. . ." (R. 121.) The other employers participating in the joint negotiations who also at that time acquieseed in the "final *Union* demand" were Del Farm, A & P, Kroger, Goldblatts, Hillman's, Sure-Save, High-Low, and Wieboldt's (R. 121-122), as well as respondent. And the acquiescence of all these employers, including major chains, came as the culmination of negotiations at which the unions "had made concessions and the employers' group generally had made concessions," and the acquiescence of the employers was expressed in a poll of them taken by R. Emmett Kelly, the chief union spokesman, "to determine their acceptance of the final *Union* demand and . . . [the] final *Union* demand excluded night operations. . . ." (R. 121, emphasis supplied.) There was not a shred of evidence to differentiate Associated's position from that of any other employer, including Respondent. There was not a scintilla of evidence to show any conspiracy among members of Associated. There was not a tittle of evidence of any conspiracy of any kind to which Associated, its officers, or its members were a party. There was simply no evidence at all of any conspiracy by anyone.

Not only was there a total failure of proof of any conspiracy among members of Associated to limit market operating hours to 6:00 P. M., but there was conclusive affirmative evidence that this limitation was a long-standing

union objective achieved long ago and maintained by the unions acting on their own. Union spokesman R. Emmett Kelly in the "gaslight era," with his father and other union officials, "went around to the markets as a boy to help close them down" "on Sundays and at nights after 6 o'clock." (R. 104-105.) In 1954, in a letter to the members, Kelly stated that "With your solid support and cooperation Chicago and suburbs will always close every night of the week at the *Union* closing hour of 6:00 P.M." (R. 108, emphasis supplied.) The unions had indeed removed another local union from their bargaining group because of the latter's tolerance in its territory of "night operations, which is what 'we have been fighting against all these years.' " (R. 112-113.) The unions fought "night operations and with it, absence from your homes and families . . ." (R. 131.) In 1961, in a letter to Kelly, respondent itself recognized that "During these negotiations, and also the negotiations for the last several years, you have consistently maintained that neither our [respondent's] meat cutters, nor those of any other employer want to work after 6:00 P. M." (Pl. ex. 10.) In 1962, a poll of respondent's meat cutters showed that 759 opposed working nights with only 28 favoring it (R. 145). Finally, from the time in 1933 or 1934 when respondent first began meat department operation in its stores, its meat markets in the Chicago area have closed at 6:00 P M. (R. 315-316).

On this state of the record, with the issue as framed by the complaint in accordance with this Court's decision in *Allen Bradley* being conspiracy, there was no reasonable alternative to dismissal of the complaint against Associated and Bromann.

C. *The state of the record at the close of all the evidence:* If the dismissal of the complaint against Associated and Bromann was correct at the close of plaintiff's case, that ends the matter as to them. For they cannot

be held on the basis of anything that transpired in the continuation of the trial against other defendants after their dismissal from the proceedings. In actuality, however, the unions' evidence totally disproved conspiracy.

The limitation which Associated and Bromann had supposedly conspired to bring into being and to maintain had in fact "originated as a result of the Union's strike against the 81 hour, 7 day work week in 1919, long before plaintiff sold meat or Associated was organized." (R. 671). As summarized by the District Court (R. 670):

> The record showed only that Bromann, on behalf of Associated, which represented some 1,000 individual and independent food stores, dealt with the unions at arm's length. At no time did he receive a direction to demand a 6 P. M. closing; nor did he make any such demand. On the contrary, Associated, through Bromann, joined in the all-employer offer of November 15, 1957, demanding the elimination of the restriction on night marketing, and specifically requested that change from the union representative at a sub-committee meeting. Even Vorbeck's letter of October 1, 1961, to his company [Jewel], stated that Associated did not oppose night work, but that some opposition came from other chains. This fluctuating opposition by some employers to night operations because of their high cost is hardly tantamount to a conspiracy with the unions. Hence, any attempt to reassert that theory must fail.

Other circumstances furnish further confirmation. George P. Kokalis, a chain store operator who in 1957 favored night operations (R. 415, 421-422, 584-585, 365), testified that "Mr. Bromann was in accord" with night operations (R. 422). In the 1959 and 1961 negotiations Associated's position on night operations was identical with that of all employers (R. 515-522, 525-529, 530-532, 534-537, 555-556, def. exs. 36, 38), if not indeed more favorably inclined towards night operations in 1961 than most (R. 530-532). The members of Associated have no mercantile

characteristics different from other store operators, there being included among their number both small chain and single store operators running both service and self-service markets (R. 607-609, 413-415). And respondent itself described Bromann as an "able negotiator" who would be "acceptable" to the entire employer group as its spokesman (R. 412).

Finally and decisively, the limitation upon market operating hours was shown to be, in origin and continuance, a union aim achieved by union bargaining power serving the unions' end to keep from working nights and to safeguard butchers' work from performance by other than butchers (R. 672).

D. *The upshot:* It may be that the exemption of unilateral labor union activity from the antitrust laws is bad, but "the desirability of such an exemption of labor unions is a question for the determination of Congress." *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 810. Repeal should not be worked by the judicial indirection of finding forbidden concert with non-labor groups in nothing more than conventional multi-employer bargaining. Such indirection impairs a socially desirable form of negotiation and stamps with illegality employer conduct which is altogether innocent. Like all other employers, including respondent, who no less than all other employers has signed and observed the agreements, Associated acquiesced in the limitation upon market operating hours as part of the best bargain it could make, given the economic power the unions are capable of mustering to support their demands. This may be surrender, but it is not conspiracy.

III. The Question of Partial Invalidity.

The Union collective bargaining agreement by its own terms negatives the existence of any restraining impact on trade. Absent any overt act on the part of Petitioners to implement the 6 o'clock closing provision, the Court below must finds its entire support for its conclusions within the provisions of the said Union agreement. Yet the Court chose to ignore completelv Article I, Section 1.4 at Page 8 in Plaintiff's Exhibit 8 which calls forth under the title of *"Partial Invalidity"* the following provision:

> "Nothing contained in this agreement is intended to violate any Law, Rule, or Regulation made pursuant thereto. If any part of this Agreement is construed by a court or board of competent jurisdiction to be in such violation, then that part shall be made null and void, the remainder of the Contract shall continue in full force and the parties will immediately begin negotations to replace the void part with a valid provision."

Thus from the foregoing it is interesting to notice that even the contract document itself, which the Court below held to contaminate every signatory (except Respondent) with antitrust violations, actually contained a clause making any or all of its provisions incapable of execution, should it appear that said provisions were contrary to antitrust law. Strangely enough, the Court of Appeals ignores this important provision and chooses to conclude that the agreement actually calls for conduct in violation of antitrust law.

In the minds of Petitioners, the 6 o'clock closing provision was "stillborn." Not having requested its inclusion, not having lifted a finger toward its execution, not being desirous of bringing a strike down upon the heads of its dozens of small corner grocers by refusal to bow before the Union demand, and not believing that the contract by

its terms could be carried out to create an illegal restraint on trade, Petitioner stands innocent, exactly as the Federal District Court found it to be.

IV. Incorporation of Questions in Companion Petition.

This petition also incorporates the questions presented in the companion petition filed by the unions in No. 240, October Term, 1964, and adopts as well the reasons stated in that petition for granting the writ. As it did when petitioners elected in the court below to stand upon the Unions' briefs, doubtless the court below would infer from this reliance that the "agreement between the unions and Associated Food Retailers is still operative as shown by their common defense in this case." (Pet., p. 11a, No. 240, October Term, 1964.) We are confident, however, that this Court will find nothing sinister in a "common defense."* Indeed, all that it in truth evidenced in the court below is Associated's and Bromann's impecunity. Unlike either the unions or respondent, who have ample financial means to conduct protracted and expensive litigation, Associated and Bromann simply do not have the wherewithal necessary to wage legal warfare. They are in fact pygmies embroiled in a battle of giants, and realistically the only reason that they have been drawn into this fight is that respondent needs to identify some employer group that the unions are supposed to have aided as co-conspirators in order to state an antitrust violation against the unions. The extent to which that charge of conspiracy has been disproved is tellingly confirmed by the compulsion felt by the court below to invoke a "common defense" against conspiracy to show that illicit alliance exists. It is the Plaintiff who has

* Cf. Rule 23(a) of the Rules of this Court: "Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases."

made Petitioners into common defendants, but this shoul not automatically make them common conspirators.

CONCLUSION.

For the reasons stated this petition for a writ o certiorari should be granted.

Respectfully submitted,

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